SUPREME COURT, U. S.

No. 71-668

DEC 10 1971

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# In the Supreme Court of the United States

OCTOBER TERM, 1971

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RUDOLPH SANTOSTASO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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No. 71-644

RUDOLPH SANTOBELLO, PETITIONER

*v.*

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After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of assaulting, resisting and impeding federal officers in the performance of their official duties, in violation of 18 U.S.C. 111, and sentenced to eighteen months' imprisonment. The court of appeals affirmed without opinion (Pet. App. 1a-2a).

Petitioner's only claims in this Court concern the joinder and joint trial of the charges against him

with other charges against co-defendants Natale and Galasso. Petitioner was charged in Count Five of the seven-count indictment. Natale was charged in Counts One and Two with assaults on federal officers, in violation of 18 U.S.C. 111 and 1114, and in Counts Three and Four with liquor refill violations under 26 U.S.C. 5301(c)(4) and 5606; Galasso was charged in Counts Six and Seven with liquor refill violations under 26 U.S.C. 5301(c)(4) and 5606 (see Pet. App. 3a-6a). The three defendants were convicted of all charges against them following their joint trial.

The government's evidence showed that during business hours on June 29, 1970, Special Investigators Ike, Waxman, and Doyle from the Alcohol, Tobacco and Firearms Division of the Treasury Department went to the Chez Joey Lounge in the Bronx to conduct a routine liquor dealer inspection.[1] Ike identified himself to Galasso, who was tending bar, and informed him of the agents' purpose. Galasso said "Here is the bar. It is yours. Go ahead and do what you have to do." The agents then selected various liquor bottles for testing. (A. 64-67; Tr. 263-264, 400-402.[2]) After testing forty bottles, Ike departed to obtain corks or stoppers for some twenty-two bottles which were suspected of having been refilled (Tr. 225).

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[1] Their authority to do so is not questioned here. See *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72.

[2] "A." refers to defendants' appendix in the court below; "Tr." refers to the transcript of proceedings at trial.

During Ike's absence Natale, the owner of the bar, arrived. When Waxman showed Natale his credentials and explained the object of the agents' visit, Natale became enraged and shouted that the authorities were trying to frame him.[3] Shortly thereafter, he began to destroy the bottles selected by the agents for sampling and threw one bottle at Doyle. He physically ejected Waxman from the premises, with Doyle following, and Galasso locked the door (Tr. 267-268, 271-272).

When Ike returned to the bar, he found the premises closed and his fellow agents outside. After Waxman advised Ike of what had occurred, the three investigators approached Natale, who was standing nearby with petitioner and some other men (A. 75-76; Tr. 282-283). In petitioner's presence Waxman introduced Ike to Natale as a federal officer, and Ike displayed his credentials. Ike then placed his hand on Natale's shoulder and told him that he was under arrest for assaulting a federal officer and destroying seized bottles (A. 75-77). At this point, petitioner knocked Ike's arm from Natale and told Ike, "You touch him again and you won't leave the block alive" (A. 77). Ike drew his gun and said: "Back off. I don't want any more trouble with you" (A. 78). The agents then left with Natale.

Petitioner contends that the trial judge erroneously denied his pre-trial motion for a severance because

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[3] At the time, the New York State Liquor Authority was conducting proceedings to determine whether Natale's liquor license should be revoked (Tr. 200).

the charge against him was unrelated to the other counts of the indictment, and because joinder prevented him from calling his co-defendants to testify in his behalf. As the recitation above indicates, however, the evidence as to petitioner's offense was inextricably related to the other counts against his co-defendants, and therefore joinder was appropriate. Compare *United States* v. *Borelli*, 435 F. 2d 500 (C.A. 2). The trial judge sought to protect petitioner by specifically advising the jury to determine petitioner's guilt or innocence without regard to the proof as to the other defendants (A. 180). And while petitioner claims that the joinder prejudiced his defense by denying him the testimony of his co-defendants, in fact Natale took the stand and testified that petitioner had never touched or said anything to Ike (A. 124). In the circumstances here, then, there was no error in the trial court's denial of a severance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

DECEMBER 1971.

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